(6)

No. 94-6615

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CARL THOMPSON,
Petitioner,

v.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONER

JULIE R. O'SULLIVAN
(Appointed by This Court)
Associate Professor of Law
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20009
(202) 662-9394
Counsel of Record for Petitioner

55 pp

QUESTION PRESENTED

Whether the Ninth Circuit erred in treating as a finding of fact, presumed correct under 28 U.S.C. § 2254 (d), the state court's application of the legal standard for determining "custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966), to the circumstances of the case.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-6615

CARL THOMPSON,

Petitioner,

v.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (JA 40-42) is unreported. The orders of the United States District Court for the District of Alaska (JA 33-38) are unreported. The opinion of United States Magistrate Judge Harry Branson (JA 25-31), as amended (JA 32), is unreported. The Alaska Supreme Court's denial of discretionary review (JA 24) is unreported. The opinion of the Alaska Court of Appeals (JA 10-23) is reported at *Thompson v. State*, 768 P.2d 127 (Alaska Ct. App. 1989). The opinion of the Alaska Superior Court for the Fourth Judicial District (JA 3-9) is unreported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its opinion on August 11, 1994. A petition for *certiorari* was timely filed on October 31,

1994 and was granted on January 23, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amend. V:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

The text of 28 U.S.C. § 2254(d) is reprinted in the Appendix to this brief beginning at page A-1.

STATEMENT OF THE CASE

On September 10, 1986, the body of Dixie Thompson, petitioner Carl Thompson's ex-wife, was recovered from a lake in Alaska. (JA 3). In the course of his investigation into Ms. Thompson's murder, Trooper Stockard of the Alaska State Troopers contacted petitioner on September 15, 1986, and requested that he come to trooper headquarters.[1] (JA 4) Although Trooper Stockard told petitioner that the troopers needed his help in identifying property that they believed belonged to Ms. Thompson (JA 4), the request was a "pretext." (JA 26) At this time, the troopers had concluded that petitioner had killed Ms. Thompson (JA 6), and Trooper Stockard's primary reason for contacting petitioner was to question him about the murder. (JA 11)

Petitioner arrived at Alaska State Trooper headquarters in his own truck. (JA 6) He immediately identified the recovered property as Ms. Thompson's (Tr. 1-4), but was then interrogated for two hours by two plainclothes officers, Troopers Stockard and Hard, in a small interview room at trooper headquarters. (JA 6, 19) Although the troopers knew that petitioner was represented by retained counsel in connection with another

[1] Petitioner had previously spoken to investigators on September 11 and 12, 1986. (JA 4) These statements were not included in petitioner's suppression motion, *see, e.g.* (JA 5), and are not at issue in this case.

pending case (JA 7), petitioner's counsel was not present and the troopers at no time advised petitioner of his *Miranda* rights, including his right to have counsel present during the interrogation. (JA 19)

On several occasions during the tape-recorded interrogation, petitioner was told that he was not under arrest and that he could leave at any time. (JA 6, 19) However, the troopers also repeatedly informed petitioner that they knew he had killed his ex-wife and reviewed some of the evidence that they said would prove his guilt; told petitioner that they were executing a search warrant at his house and would be serving a search warrant for his truck; advised petitioner that this was his last opportunity credibly to tell them his side of the story; posited excuses for the crime, inviting claims of self-defense and heat of passion which they said would mean that petitioner would face significantly less jail time; and repeatedly suggested that the victim, not petitioner, was to blame. *See infra*, at pages 38-43.

Finally, petitioner admitted killing his wife in self-defense. (JA 27) His truck was seized at the conclusion of the interrogation. (JA 6) A trooper drove petitioner to a friend's residence (JA 6, 78), where the trooper evidently waited outside in his official vehicle. (St. 2478)[2] Petitioner was arrested approximately two hours later pursuant to a warrant based on the affidavits for the search warrants, as well as his statement. (JA 6). He was charged with first-degree murder. (JA 11)

Petitioner was subsequently indicted by a grand jury in the Alaska Superior Court for the Fourth Judicial District for first-degree murder, under Alaska Statute 11.41.100 (1994), and for tampering with physical evidence in connection with the murder, under Alaska Statute 11.56.610 (1994). (JA 10) Before trial, petitioner moved to suppress the statement he had given to

[2] Citations to "St." refer to the state court trial and appellate records which were lodged with the Supreme Court on microfiche.

the troopers on September 15 on the ground that he had not been advised of his rights prior to this custodial interrogation and thus that the statement was obtained in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436, 467-468 (1966). He also argued that the statement was involuntary and its admission violated his right to due process of law under the Fourteenth Amendment. *See, e.g.*, (JA 5, 17)

The trial court decided the motion on the papers submitted, without holding an evidentiary hearing. (St. 2503, 2530) It opined that the question of whether petitioner was in "custody" for *Miranda* purposes was a "very close" one, noting that "in viewing the conduct of the police after the statement, that is, arresting the defendant by means of a warrant within two hours of the statement, [sic] appears to be a *devious police tactic*. It would appear that the police felt they could obtain a statement implicating the defendant by doing so, letting him return home and arrest[ing] him immediately" (JA 8-9) (Emphasis added) After applying this Court's objective legal standard for determining "custody," the trial court "conclude[d]" that petitioner was not in custody for *Miranda* purposes. (JA 7-9). It also ruled petitioner's statement voluntary, and thus admissible. (JA 8)

At trial, petitioner defended on the ground that he initially stabbed Dixie Thompson in self-defense and that he had then lost control and killed her in the heat of passion. (JA 12) The prosecution played for the jury portions of the tape recording of the interrogation. (JA 19) The jury convicted petitioner of murder in the first degree and of tampering with physical evidence. (JA 10)

On appeal, the Alaska Court of Appeals affirmed petitioner's conviction. (JA 23) The Court recognized that "Judge Hodges appears to have found that the police intentionally arranged to interrogate Thompson in a non-

custodial manner to increase the likelihood that they would get a statement from him. Judge Hodges described this as a 'devious police tactic.' " (JA 16) The court, evidently applying *de novo* the legal standard for "custody" to the facts, nevertheless agreed with the lower court's conclusion that the police were not required to give petitioner *Miranda* warnings because he was not in "custody." (JA 15-17) It further held that petitioner's statement was voluntarily made. (JA 19)[3]

The Alaska Supreme Court refused discretionary review of petitioner's conviction. (JA 24) Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Alaska, claiming that his September 15 statement was involuntary and unwarned and that it therefore was admitted in evidence in violation of due process and *Miranda*. (JA 27-28) On December 29, 1992, United States Magistrate Judge Harry Branson issued an initial report and recommendation. (JA 25-31)[4] On December 8, 1993, the United States District Court for the District of Alaska filed an order denying the writ, ruling that the state court's conclusion that petitioner was not in "custody" for *Miranda* purposes was entitled to a presumption of correctness under 28 U.S.C. § 2254(d). (JA 37)

---

[3] The trial court sentenced petitioner to a ninety-nine year term of imprisonment on the murder conviction and to a consecutive five year term on the tampering with evidence conviction. (JA 21) The Alaska Court of Appeals vacated the sentences and directed that the trial court impose concurrent sentences (JA 23); on remand, the trial court did so. (St. 779-780).

[4] The District Court initially approved the Magistrate Judge's report and denied the petition on February 18, 1993. (JA 33-34) Petitioner filed a motion to vacate judgment and allow a new ten-day period to file objections to the Magistrate Judge's report. (JA 35) The District Court granted the motion on July 19, 1993, and petitioner filed timely objections. (JA 35) The Magistrate Judge, after correcting a typographical error, certified his initial report and recommended it as final. (JA 32, 35)

The District Court granted petitioner's motion for a certificate of probable cause (JA 39), and he appealed the denial of the writ to the United States Court of Appeals for the Ninth Circuit. In an unpublished opinion relying upon its decision in *Krantz v. Briggs*, 983 F.2d 961 (9th Cir. 1993), the Ninth Circuit affirmed, holding that "a state court's determination that a defendant was not in custody for purposes of *Miranda* is a question of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d)." (JA 41) The Ninth Circuit concluded that the state court's "custody" determination had "fair support" in the record (JA 41), and further held that petitioner's confession was voluntary. (JA 42)

SUMMARY OF ARGUMENT

1. The historical facts surrounding petitioner's unwarned statement—the content, location and duration of the questioning and the circumstances of the interrogation—are "factual issue[s]" whose state-court resolution is presumed correct on federal habeas review under 28 U.S.C. § 2254(d). By contrast, the question whether, given the totality of these undisputed circumstances, petitioner was in "custody or otherwise deprived of his freedom of action in any significant way" such that the admission of his unwarned statement violated his rights under *Miranda*, 384 U.S. at 444, is a mixed question of law and fact that is not subject to section 2254(d)'s presumption of correctness.

2. In examining whether a suspect is in "custody" for *Miranda* purposes, the applicable standard is whether, given the totality of the relevant circumstances, a reasonable person would have understood that he or she was under arrest or that his or her freedom of movement was restrained to a degree associated with an arrest. *Stansbury v. California*, —— U.S. ——, 114 S.Ct. 1526, 1529 (1994) (*per curiam*). What a reasonable person would have believed given the totality of the uncontested circumstances is incapable of being found as an historical fact; the trier of fact cannot plumb the state of mind of this legal construct. Because the application of the objective "custody" standard requires the determination not of historical facts but of the legal significance of the facts as found, the *Miranda* "custody" inquiry is a straightforward mixed question of law and fact under the traditional definition articulated in *Townsend v. Sain*, 372 U.S. 293 (1963), and used by this Court to distinguish between "factual issues" subject to section 2254(d)'s presumption of correctness and mixed questions of law and fact whose review is unconstrained by the presumption. Although this Court has never explicitly addressed the question whether the *Miranda* "custody" inquiry is a factual issue or a mixed question of law and fact, it has implicitly recognized the essentially legal nature of the inquiry by conducting independent review of "custody" determinations.

3. The considerations of sound judicial administration relied upon by this Court in *Miller v. Fenton*, 474 U.S. 104 (1985), require that the Court continue to treat the "custody" issue as a mixed question subject to *de novo* review. The *Miranda* Court determined that only where a suspect is subjected to "custodial interrogation" is the free exercise of Fifth Amendment rights sufficiently jeopardized to require the provision of warnings which may hamper law enforcement's investigatory efforts. The Court has largely declined to forge rigid, fact-determinative rules as to when *Miranda* "custody" does or does not exist, because such rules would result in the underprotection, and overprotection, of Fifth Amendment rights in discrete cases. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 441 (1984). Rather, the Court has applied its objective standard to the circumstances in light of the policies and Fifth Amendment values underlying the *Miranda* decision. The plenary review traditionally accorded such an inherently legal inquiry ensures in this context that neither a suspect's Fifth Amendment rights nor law enforcement's legitimate investigatory interests are unduly compromised.

4. For the very reason that, by virtue of its uniquely legal character, "the task of defining 'custody' is a slippery one," *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), plenary review is also necessary to lend some measure of clarity and predictability to the application of the "custody" requirement in recurring factual situations. When the values underlying a legal rule cannot be completely articulated in a single, specific, always-serviceable standard, the isolation of generally applicable norms can be accomplished only through *de novo* review in a progression of cases. The importance of isolating these norms is manifest in the *Miranda* context because the bright-line value of the *Miranda* procedural rules for *how* custodial interrogations must be conducted will be lost absent uniform guidance on "the murky and difficult questions of *when* 'custody' begins." *Id.* at 316 (emphasis added).

ARGUMENT

I. THIS COURT'S TRADITIONAL *TOWNSEND v. SAIN* ANALYSIS AND THE FUNCTIONAL CONSIDERATIONS ARTICULATED IN *MILLER v. FENTON* DICTATE THAT THE QUESTION WHETHER A SUSPECT IS IN "CUSTODY" FOR PURPOSES OF *MIRANDA* IS A MIXED QUESTION OF LAW AND FACT NOT SUBJECT TO SECTION 2254(d)'s PRESUMPTION OF CORRECTNESS

Section 2254(d), of Title 28, United States Code, provides that in any federal proceeding in which a prisoner in custody pursuant to the judgment of a state court seeks a writ of habeas corpus, the state courts' "determination after a hearing on the merits of a *factual issue*" shall "be presumed to be correct" unless the petitioner establishes that one of eight statutory circumstances exists demonstrating that the state courts' findings of *"material facts"* were incomplete or their *"factfinding* procedure[s]" were inadequate. 28 U.S.C. § 2254(d) (emphasis added).[5]

[5] One of the eight exceptions provides that the presumption is inapplicable where the federal habeas court, reviewing the state-court record offered to support the factual finding, "on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record." 28 U.S.C. § 2254(d)(8).

The plain and repeated language of the statute establishes that the presumption of correctness applies only to state-court determinations of factual issues, and not to issues commonly denominated as questions of law or mixed questions of law and fact.

Accordingly, the Court has consistently recognized that section 2254(d)'s presumption of correctness applies only to state-court factual findings, and not to mixed questions of law and fact, which require the application of federal legal standards to the facts as found. *See, e.g., Schiro v. Farley*, —— U.S. ——, 114 S.Ct. 783, 790-791 (1994); *Miller*, 474 U.S. at 112, 115; *Wainwright v. Witt*, 469 U.S. 412, 428 n.8 (1985); *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983); *Sumner v. Mata*, 455 U.S. 591, 597 & nn.9, 10 (1982) (*per curiam*) (*"Sumner II"*); *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Brewer v. Williams*, 430 U.S. 387, 397 & n.4, 403-404 (1977); *see also Wright v. West*, —— U.S. ——, 112 S.Ct. 2482, 2493-2498 (1992) (O'Connor, J., concurring in the judgment); *id.* at 2498-2500 (Kennedy, J., concurring in the judgment); *cf. id.* at 2489, 2491 (1992) (plurality opinion) (implicit recognition, in discussion of standard of review applied to mixed questions, that section 2254(d)'s presumption not applicable).

Instead, the Court has long held that legal questions and mixed questions of law and fact are subject to plenary federal habeas review. *See, e.g., Miller*, 474 U.S. at 112; *see also West*, 112 S.Ct. at 2498, 2500 (Kennedy, J., concurring in the judgment) (discussing "settled principle" of *de novo* habeas review of mixed questions); *id. at* 2495-2496 (O'Connor, J., concurring

in the judgment) (collecting cases).[6] "In light of the case law and Congress' position, a move away from *de novo* review of mixed questions of law and fact would be a substantial change in [the Court's] construction of the authority conferred by the habeas corpus statute." *Id.* at 2498. In the last two terms, the Court has reaffirmed its consistent practice by conducting plenary habeas review of mixed questions of law and fact. *See, e.g., Schiro*, 114 S.Ct. at 790-791; *Brecht v. Abrahamson*, — U.S. —, 113 S.Ct. 1710, 1722-1723 (1993); *id.* at 1724 (Stevens, J., concurring); *cf. Withrow v. Williams*, — U.S. —, 113 S.Ct. 1745, 1754 (1993) (due process involuntariness claims "present a legal question requiring an 'independent federal determination' on habeas") (quoting *Miller*, 474 U.S. at 112).

To distinguish between factual issues subject to section 2254(d)'s presumption of correctness and mixed issues of law and fact whose review on habeas is not constrained by section 2254(d), the Court generally has applied the traditional definitions of factual and mixed issues articulated in *Townsend v. Sain*, 372 U.S. 293. *See infra*, pages 11-13. Its analysis has also been informed by the Court's longstanding treatment of a particular issue as a question of fact, counselling for deferential review, or of law, requiring plenary consideration.

---

[6] Other cases include: *Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517, 526-527 (1992); *Estelle v. McGuire*, 502 U.S. 62, 67-75 (1991); *Kimmelman v. Morrison*, 477 U.S. 365, 385-390 & n.10 (1986); *Strickland v. Washington*, 466 U.S. 668, 698-701 (1984); *Marshall v. Lonberger*, 459 U.S. 422, 431-432, 436-437 (1983); *Sumner v. Mata*, 455 U.S. 591, 597 & nn.9, 10 (1982) (*per curiam*) ("*Sumner II*"); *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Jackson v. Virginia*, 443 U.S. 307, 318, 323-326 (1979); *Manson v. Brathwaite*, 432 U.S. 98, 114-117 (1977); *Brewer v. Williams*, 430 U.S. 387, 397 & n.4, 403-404 (1977); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974); *Neil v. Biggers*, 409 U.S. 188, 193 n.3, 199-200 (1972). *See also* Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* §§ 2.4d, 20.3d, 30.2 (2d ed. 1994).

See infra, pages 21-22. Where classification according to the traditional definitions proves difficult, as in *Miller v. Fenton*, 474 U.S. 104, the Court has further supplemented its analysis by inquiring whether practical considerations underlying the sound administration of justice militate toward treating the question as one of fact or law. *See infra*, pages 23-24. The Court's traditional *Townsend* analysis, its longstanding *de novo* treatment of the "custody" issue, and the policy considerations weighed in *Miller*, all dictate that the question whether a suspect is in "custody" and thus is entitled to the protections of *Miranda* is a mixed question of law and fact that is not subject to section 2254(d)'s presumption of correctness.

A. The *Miranda* "Custody" Determination Requires A Court To Apply An Objective Legal Standard To The Undisputed Facts, Assessing Not What Happened But The Legal Significance Of What Happened, And Is Therefore A Mixed Question Of Law And Fact Under The Court's Traditional *Townsend v. Sain* Analysis

In *Townsend v. Sain*, 372 U.S. 293, the Court, drawing upon Justice Frankfurter's separate opinion endorsed by a majority of the Court in *Brown v. Allen*, 344 U.S. 443 (1953), articulated the distinction between questions of fact and mixed questions of law and fact that serves as the basis for the Court's traditional analysis. The *Townsend* Court premised its extended discussion of the duties of federal habeas courts to hold hearings on factual issues that had not been fully, reliably or fairly found by the state courts on the following distinction:

> By "issues of fact" we mean to refer to what are termed *basic, primary, or historical* facts: facts "in the sense of a recital of external events and the credibility of their narrators . . . ." *Brown v. Allen*, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter). *So-called mixed questions of fact and law, which require the application of a legal standard to the*

historical-fact determinations, are not facts in this sense.

372 U.S. at 309 n.6 (emphasis added).[7]

The Court has relied upon these definitions to distinguish between findings of basic, primary, or "historical" facts, which are accorded the section 2254(d) presumption of correctness, and conclusions flowing from the application of federal law to the historical facts, which are not presumed correct. *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (juror bias is a question of "historical fact," not a mixed question); *Strickland*, 466 U.S. at 698 (performance and prejudice components of the ineffectiveness of counsel inquiry are not questions of " 'basic, primary, or historical fac[t],' " subject to section 2254(d)'s presumption but rather are mixed questions of law and fact) (quoting *Townsend*, 372 U.S. at 309 n.6); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*) (application of harmless error standard is a question of federal law but issue of juror impartiality is one of "historical fact" entitled to presumption of correctness); *Marshall*, 459 U.S. at 431-432, 436-437 (application of voluntariness standard for guilty pleas is a question of federal law subject to *de novo* review although underlying "historical facts" are entitled to presumption of correctness); *Sumner II*, 455 U.S. at 597 & nn.9, 10 (state determinations of "historical fact" are presumed correct but the constitutionality of pretrial identification

[7] The distinction drawn between factual issues and mixed questions of law and fact in Justice Frankfurter's opinion in *Brown v. Allen*, 344 U.S. 443, 506-507 (1953) and in the Court's opinion in *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) was consistent with a long line of Supreme Court precedent. *See, e.g., Ker v. California*, 374 U.S. 23, 32-34 (1963); *Irwin v. Dowd*, 366 U.S. 717, 723 (1961); *Watts v. Indiana*, 338 U.S. 49, 50-51 (1949); *Baumgartner v. United States*, 322 U.S. 665, 670-671 (1944); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 490-491 (1937); *Helvering v. Rankin*, 295 U.S. 123, 131 (1935); *Norris v. Alabama*, 294 U.S. 587, 589-590 (1935); *Fiske v. Kansas*, 274 U.S. 380, 385-387 (1927).

procedures is a mixed question of law and fact not governed by section 2254(d)); *Cuyler*, 446 U.S. at 341-342 (section 2254(d)'s presumption ruled inapplicable because whether counsel engaged in multiple representation is not a question of " 'basic, primary or historical' " fact " 'in the sense of a recital of external events and the credibility of their narrators' " but rather is "a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case") (quoting *Townsend*, 372 U.S. at 309 n.6 and *Brown*, 344 U.S. at 506 (opinion of Frankfurter, J.)); *Brewer*, 430 U.S. at 397 & n.4, 403-404 ("the question of waiver [of respondent's Sixth Amendment right to the assistance of counsel] [is] not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires 'application of constitutional principles to the facts as found' ") (quoting *Brown*, 344 U.S. at 507 (opinion of Frankfurter, J.)) (citing *Townsend*, 372 U.S. at 309 n.6); *see also Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (whether on direct or habeas review, "[a] federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court") (citing *Townsend*, 372 U.S. at 318 and *Brown*, 344 U.S. at 506-507 (opinion of Frankfurter, J.)).[8]

[8] In *Townsend*, 372 U.S. at 318, the Court stated that when an evidentiary hearing was not required, the federal habeas court "may, and ordinarily should, accept the facts"—which the Court had defined as basic, primary, or historical facts—as found in the state proceeding. In the 1966 amendment to the habeas corpus statute which added section 2254(d), Act of Nov. 2, 1966, Pub. L. 89-711, 80 Stat. 1105, "Congress elevated that exhortation into a mandatory presumption of correctness." *Miller v. Fenton*, 474 U.S. 104, 111-112 (1985). Before doing so, Congress considered *Brown*, *Townsend* and other cases in which the Court had drawn a distinction between factual issues and mixed questions. *See, e.g.*, H.R. Rep. No. 1384, 88th Cong., 2d Sess. 23-26 (1964); Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d, at p. 65 n.270. "When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Con-

Employing the Court's traditional analysis, the application of the objective standard for determining whether a suspect is in "custody" for *Miranda* purposes to the totality of the circumstances of the case must be denominated a mixed question of law and fact. In *Miranda*, this Court concluded "that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not

---

gress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989); *see also BFP v. Resolution Trust Corp.*, —— U.S. ——, 114 S.Ct. 1757, 1764 (1994); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986); *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 501 (1986). In crafting section 2254(d)'s presumption of correctness for state-court determinations of "factual issues," then, Congress presumptively adopted the *Townsend* definitions of questions of fact, "'in the sense of a recital of external events and the credibility of their narrators,'" (372 U.S. at 309 n.6), and mixed questions of law and fact, involving the application of legal standards to the facts found (*id.*). *See Miller*, 474 U.S. at 112 ("there is absolutely no indication that [Congress] intended to alter *Townsend*'s understanding that the 'ultimate constitutional question' of the admissibility of a confession was a 'mixed questio[n] of fact and law' subject to plenary federal review") (quoting *Townsend*, 372 U.S. at 309 & n.6); *see also Wright v. West*, 112 S.Ct. 2482, 2498 (1992) (O'Connor, J., concurring in the judgment); *Cuyler*, 446 U.S. at 341-342 (stating that the *Townsend* opinion, "the precursor of § 2254(d)," "examined the distinction between law and fact as it applies on collateral review of a state conviction," and quoting and applying *Townsend*'s definitions); *Brewer*, 430 U.S. at 395 (stating that section 2254(d) "codifies most of the criteria set out in *Townsend v. Sain*" and applying *Townsend* definitions); *Davis v. Heyd*, 479 F.2d 446, 450 n.6 (5th Cir. 1973) ("the draftsmen of the 1966 amendments to 28 U.S.C. § 2254 used the term 'factual issue' in the same sense it was used in Townsend v. Sain"); *Imbler v. California*, 424 F.2d 631, 632 (9th Cir.) (*per curiam*) ("Section 2254(d) was drafted by a committee of the Judicial Conference of the United States composed of judges fully cognizant" of the Court's then-recent definition of mixed questions in *Townsend*), *cert. denied*, 400 U.S. 865 (1970).

otherwise do so freely." 384 U.S. at 467; *see also Withrow*, 113 S.Ct. at 1752. Accordingly, the *Miranda* Court "presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights." *New York v. Quarles*, 467 U.S. 649, 654 (1984) (footnote omitted); *see also Oregon v. Elstad*, 470 U.S. 298, 307 (1985). The obligation to administer *Miranda* warnings prior to any interrogation attaches where the coercive dangers sought to be remedied in *Miranda* are present, that is, "after a person has been taken *into custody or otherwise deprived of his freedom of action in any significant way*." *Miranda*, 384 U.S. at 444 (footnote omitted) (emphasis added); *see id.* at 445, 477; *California v. Beheler*, 463 U.S. 1121, 1123 (1983) (*per curiam*); *Beckwith v. United States*, 425 U.S. 341, 345-346 n.6 (1976); *see also Stansbury*, 114 S.Ct. at 1528-1529; *Oregon v. Mathiason*, 429 U.S. 492, 494-495 (1977) (*per curiam*).

In determining whether a person is in custody or otherwise deprived of his freedom of action in any significant way for purposes of *Miranda*, the Court has asked "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125 (quoting *Mathiason*, 429 U.S. at 495); *see also Berkemer*, 468 U.S. at 440; *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 114 S.Ct. at 1529. "'The only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.'" *Id.* (quoting *Berkemer*, 468 U.S. at 442).

The determination of *Miranda* "custody" proceeds in two steps. First, courts must identify the totality of the

relevant circumstances surrounding the interrogation. *See Stansbury*, 114 S.Ct. at 1529; *see also Beheler*, 463 U.S. at 1125. Then, the general "reasonable person" standard is applied to the facts as found. Clearly, the trial court's first-step findings constitute the determination of "factual issues" subject to section 2254(d)'s presumption of correctness if the exceptions enumerated in section 2254(d)(1)-(8) are inapplicable. Equally clearly, the second step in the process—application of the reasonable person test to the undisputed facts—fits squarely within the Court's definition of a mixed question of law and fact: "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the . . . standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see also Brewer*, 430 U.S. at 403-404; *Townsend*, 372 U.S. at 309 n.6; *Brown*, 344 U.S. at 507 (opinion of Frankfurter, J.).

This is not a situation in which the application of a legal standard essentially constitutes nothing more than the finding of a single determinative fact relating to state of mind, as may be true in cases concerning, for example, intent or juror bias. *See, e.g., Witt*, 469 U.S. at 429; *Patton*, 467 U.S. at 1036-1037 & n.12; *cf. also Arave v. Creech*, —— U.S. ——, 113 S.Ct. 1534, 1541-1542 (1993). The "custody" inquiry requires review of *all* the relevant attendant circumstances and, as this Court has repeatedly emphasized, does not turn on any actor's subjective state of mind. *See, e.g., Stansbury*, 114 S.Ct. at 1526, 1529. Indeed, no amount of factfinding can resolve the central question—how, given the objective circumstances found by the trier of fact, a *reasonable person* would have undertsood the situation—because the beliefs of a fictional reasonable person are incapable of historical analysis. *Cf. Antilles Steamship Co., Ltd. v. Members of the Am. Hull Ins. Syndicate*, 733 F.2d 195, 204 (1984) (Newman, J., concurring) ("if the law's hypothetical reasonable person were to appear in the courtroom as a deus ex machina and respond to the inquiry as to what he or she thought the terms [of the contract] meant, the answer would be a matter of fact in the traditional sense—an observable, recordable historical event. But the law's reasonable person has not yet appeared on the witness stand of any courtroom. That person remains a legal construct") (footnote omitted); *cf. also Cheek v. United States*, 498 U.S. 192, 203 (1991) (to characterize knowledge and belief, which are normally questions for the factfinder, "as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it").[9] The application of this legal construct to the facts to determine not what happened but "the legal significance" of what happened is a classic mixed question of law and fact. *Brown*, 344

[9] The standard of conduct applied in civil negligence cases also turns upon an assessment of the actions of a hypothetical reasonable person. Although "[t]he existence of negligence in a particular case often is said to be a mixed question of law and fact," Prosser, *Law of Torts* 205 (4th ed. 1971), "[i]n tort we prefer, as a matter of both policy and practicality, to let the jury select the particular standard of care; since it would be unsettling to say that the jury is deciding an issue of law, we prefer to say that the issue is one of fact. . . ." *Antilles Steamship Co., Ltd. v. Members of the Am. Hull Ins. Syndicate*, 733 F.2d 195, 206 (1984) (Newman, J., concurring); *see also id.* at 206 nn.4, 5. The practical "exception[]" crafted to permit a jury to apply community standards in negligence cases, *United States v. McConney*, 728 F.2d 1195, 1203-1204 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984), finds no purchase here where a judge, not a jury, is called upon to make this determination by reference to the policy concerns and fundamental constitutional values underlying *Miranda*, not by application of community mores. *See infra*, at pages 24-29. The custody question arises in a fairly discrete universe of situations, not, as in negligence cases, in an infinite variety of circumstances; the determination of the custody issue in these recurring or analogous factual situations is necessary to provide uniform nationwide, not community-specific, guidance for the primary conduct of law enforcement. As discussed *infra*, at pages 29-33, as a matter of policy and practicality, this mixed question should be accorded the plenary review usually reserved for such issues.

U.S. at 507 (opinion of Frankfurter, J.); *see also Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972).

As the overwhelming majority of the circuit courts to address the question have therefore recognized, the application of the objective "custody" standard to the facts of each case is an inherently legal exercise. Seven of the nine circuits that have discussed the issue of how to categorize the *Miranda* "custody" question have concluded that it is either a mixed question or a question of law.[10]

[10] The District of Columbia, Third, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits have concluded that the *Miranda* custody determination is either a question of law or a mixed question of law and fact, although there is some confusion within and among circuits on the applicable standard of review. *D.C. Circuit*: *see United States v. Baird*, 851 F.2d 376, 379 (D.C. Cir. 1988) (legal question reviewed *de novo*); *Third Circuit*: *see United States v. Calisto*, 838 F.2d 711, 716-718 & n.3 (3d Cir. 1988) (mixed question reviewed *de novo*); *United States v. Mesa*, 638 F.2d 582, 584-589 (3d Cir. 1980) (implicit *de novo* review); *id.* at 591 n.3 (Adams, J., concurring) (legal question reviewed *de novo*); *Fifth Circuit*: *see United States v. Harrell*, 894 F.2d 120, 122-125 (5th Cir.) (in reviewing custody question, court stated that "[t]he question of whether *Miranda*'s guarantees have been impermissibly denied to a criminal defendant, assuming the facts as established by the trial court are not clearly erroneous, is a matter of constitutional law, meriting *de novo* review," citing *United States v. Torkington*, 874 F.2d 1441, 1445 (11th Cir. 1989)), *cert. denied*, 498 U.S. 834 (1990); *see also United States v. Collins*, 972 F.2d 1385, 1404-1406 (5th Cir. 1992) (implicit *de novo* review), *cert. denied*, —— U.S. ——, 113 S.Ct. 1812 (1993); *Hancock v. Estelle*, 558 F.2d 786, 787-788 (5th Cir. 1977) (on habeas, implicitly reviewed *de novo* with no mention of section 2254(d)); *Sixth Circuit*: *see, e.g., Cobb v. Perini*, 832 F.2d 342, 346 (6th Cir. 1987) (on habeas, noting that "[w]hether a person is in custody is a question of law," and implicitly conducting *de novo* review), *cert. denied*, 486 U.S. 1024 (1988); *United States v. Wolak*, 923 F.2d 1193, 1196 (6th Cir.) (implicit *de novo* review), *cert. denied*, 501 U.S. 1217 (1991); *but see United States v. Mahar*, 801 F.2d 1477, 1500 & n.38 (6th Cir. 1986) (reviewed for clear error); *Seventh Circuit*: *see, e.g., United States v. Humphrey*, 34 F.3d 551, 554 n.1 (7th Cir. 1994) (mixed question reviewed *de novo*); *United States v. Levy*, 955 F.2d 1098, 1103-1104 & n.5 (7th Cir.) (mixed question but questioning *de novo* review standard), *cert. denied*, —— U.S. ——, 113 S.Ct. 102 (1992); *United States v. Hocking*, 860 F.2d 769, 772-773 (7th Cir. 1988) (mixed question reviewed *de novo*); *Tenth Circuit*: *see United States v. Griffin*, 7 F.3d 1512, 1516-1519 (10th Cir. 1993) (legal question reviewed *de novo*); *United States v. Wynne*, 993 F.2d 760, 764-765 (10th Cir. 1993) (same); *but see, e.g., Cordoba v. Hanrahan*, 910 F.2d 691, 693 (10th Cir.) (on habeas, reviewed for clear error trial court's custody determination), *cert. denied*, 498 U.S. 1014 (1990); *Eleventh Circuit*: *see United States v. Adams*, 1 F.3d 1566, 1574-1576 (11th Cir. 1993) (application of custody standard to facts reviewed *de novo*), *cert. denied*, —— U.S. ——, 114 S.Ct. 1310 (1994); *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992) (on habeas, state court's custody finding is mixed question; application of law to facts reviewed *de novo*); *Torkington*, 874 F.2d at 1445 (mixed question; application of law to facts reviewed *de novo*); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (same); *Sullivan v. Alabama*, 666 F.2d 478, 482 (11th Cir. 1982) (on habeas, implicitly reviewed *de novo* without mention of Section 2254(d)); *but see Purvis v. Dugger*, 932 F.2d 1413, 1418-1419 (11th Cir. 1991) (Section 2254(d) presumption applied to state court's custody determination), *cert. denied*, 503 U.S. 940 (1992).

Another circuit, the Eighth, has acknowledged that the "custody" determination is a mixed question of law and fact, *see United States v. Mottl*, 946 F.2d 1366, 1368 (8th Cir. 1991); *United States v. Griffin*, 922 F.2d 1343, 1347-1348 (8th Cir. 1990), although it has applied section 2254(d)'s presumption of correctness to a "custody" determination. *Feltrop v. Delo*, 46 F.3d 766, 773 (8th Cir. 1995). Only the Ninth Circuit has concluded that the "custody" question is one of fact. *See, e.g., Thompson v. Keohane* (JA 40-42); *Krantz v. Briggs*, 983 F.2d 961, 963-964 (9th Cir. 1993).[11]

[11] The First, Second and Fourth Circuits have not expressly addressed the question and have applied varied standards of review. *First Circuit*: *see, e.g., United States v. Lanni*, 951 F.2d 440, 441, 443 (1st Cir. 1991) (reviewed for clear error); *United States v. Masse*, 816 F.2d 805, 808-810 & n.4 (1st Cir. 1987) (same); *Podlaski v. Butterworth*, 677 F.2d 8 (1st Cir. 1982) (per Breyer, J.) (on habeas, implicitly reviewed *de novo*); *Second Circuit*: *see, e.g., United States v. Mitchell*, 966 F.2d 92, 98 (2d Cir. 1992) (reviewed for clear error); *United States v. Kirsteins*, 906 F.2d 919, 924

No less compelling is this Court's apparent assumption, albeit without formal consideration, that *Miranda* "custody" is a question requiring plenary review. The *Miranda* Court made clear that it contemplated some flexibility in the administration of its new procedural requirements, but firmly took responsibility for enforcing *Miranda*'s basic standards. *See Miranda*, 384 U.S. at 490-491. Since that time, the Court has fulfilled this responsibility by implicitly exercising independent review of the threshold question whether a suspect is entitled to *Miranda*'s protections because he or she is in "custody," without according any stated deference to lower court determinations of the issue and regardless of whether the case involved a federal or state prosecution or arose on direct or habeas review. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296-300 (1990) (plenary review, without stated deference to lower courts, of custodial interrogation issue); *Pennsylvania v. Bruder*, 488 U.S. 9, 10-11 (1988) (*per curiam*) (independent determination of "custody" issue without deference to state-court determination); *Berkemer*, 468 U.S. at 435-442; *Murphy*, 465 U.S. at 430-431 (*de novo* examination without stated deference to state-court determination of "custody"); *Beheler*, 463 U.S. at 1123-1126 (independent examination of "custody" determination without stated deference to lower court determinations); *Estelle v. Smith*, 451 U.S. 454, 466-469 (1981) (plenary habeas review of applicability of *Miranda* without stated deference to lower state and federal court determinations); *Mathiason*, 429 U.S. at 494-496 (independent examination of "custody" issue without according deference to lower court conclusions); *Beckwith*, 425 U.S. at 344-348 (same); *Orozco v. Texas*, 394 U.S. 324, 325-327 (1969) (same); *Mathis v. United States*, 391 U.S. 1, 3-5 (1968) (same); *cf. Stansbury*,

(2d Cir. 1990) (accepting facts found by District Court but apparently conducting *de novo* review of application of standard to those facts); *Fourth Circuit*: *see, e.g., United States v. Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986) (implicitly reviewed *de novo*); *Davis v. Allbrooks*, 778 F.2d 168, 170-172 (4th Cir. 1985) (same).

114 S.Ct. at 1530-1531; *United States v. Calisto*, 838 F.2d 711, 718 n.3 (3d Cir. 1988); *United States v. Mesa*, 638 F.2d 582, 591 n.3 (3d Cir. 1980) (Adams, J., concurring).

For example, in *Berkemer v. McCarty*, 468 U.S. 420, the Court faced on habeas review the issue whether, by virtue of a pre-arrest traffic stop, the respondent could be deemed to have been in "custody" for *Miranda* purposes. Although the state and lower federal courts had not reached the issue, the Court did not remand for further factfinding, instead conducting a *de novo* review of the question.[12]

The fact that the Court has consistently, if implicitly, understood the threshold "custody" question to be one requiring plenary review demonstrates the legal nature of the inquiry, and is an important factor in its own right

[12] In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the respondent made unwarned statements in response to roadside questioning during a traffic stop, and gave further unwarned statements after his arrest for operating a car under the influence of drugs or alcohol. The state courts, and the federal District Court on habeas review, ruled that *Miranda* was inapplicable to misdemeanor traffic violations and thus that the statements were properly admitted against the respondent. *Id.* at 424-425. The Sixth Circuit reversed, holding that *Miranda* warnings must be given to all individuals prior to custodial interrogation regardless of the classification of the offense under investigation. *Id.* at 425. However, because the Sixth Circuit held that the respondent's conviction would be vacated and the writ issued due to the improper use of his unwarned post-arrest statements, its opinion was "uncertain as to the status of the prearrest confessions." *Id.* at 426; *see also id.* at 435 n.23. The Supreme Court affirmed the Sixth Circuit's holding with respect to the post-arrest statements. *Id.* at 434-435. In part because "the relevance of *Miranda* to the questioning of a motorist detained pursuant to a traffic stop is an issue that plainly warrants our attention, and with regard to which the lower courts are in need of guidance," the Court went on independently to apply the *Miranda* custody standard to the pre-arrest circumstances of the traffic stop even though the lower courts did not address this issue, ultimately determining that the respondent was not in custody. *Id.* at 435-436 & n.23, 441-442.

in determining the appropriate characterization of the question in future. *Cf. Miller*, 474 U.S. at 109-112, 115 (emphasizing importance of Court's traditional treatment of the voluntariness issue); *cf. also Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Pullman-Standard*, 456 U.S. at 287-288.[13]

---

[13] The Court's treatment of the "custody" question is consistent with its treatment of other, similar issues concerning the scope and content of *Miranda*'s requirements, particularly its plenary review of the question whether a suspect has been subjected to custodial "interrogation" within the meaning of *Miranda*. For example, in *Arizona v. Mauro*, 481 U.S. 520, 527-529 n.6 (1987), the Court independently applied the "legal standard" for *Miranda* "interrogation," explicitly stating that it was not overturning any "factual findings" in rejecting the Arizona Supreme Court's determination that the defendant was subjected to custodial "interrogation." *See also Rhode Island v. Innis*, 446 U.S. 291, 302-304 (1980) (vacating and remanding Rhode Island Supreme Court's ruling that defendant was "interrogated" within the meaning of *Miranda*); *cf. Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (plurality opinion) (vacating Pennsylvania Superior Court's ruling that certain questions constituted "interrogation," holding, *inter alia*, that the questions fell within the routine booking question exception to *Miranda*); *United States v. Taylor*, 985 F.2d 3, 7 n.5 (1st Cir.) (need for plenary review of *Miranda* "interrogation" is implicit in the Supreme Court's cases), *cert. denied*, —— U.S. ——, 113 S.Ct. 2426 (1993). Similarly, the Court has exercised apparent plenary review, without suggesting that any deference is due lower court determinations, largely to ensure that *Miranda*'s requirements are not read too broadly in: (1) assessing the adequacy of any warnings given, *see, e.g., Duckworth v. Eagan*, 492 U.S. 195, 200-205 (1989) (on habeas review, reversing Seventh Circuit's holding that warnings were inadequate under *Miranda*); *California v. Prysock*, 453 U.S. 355, 361 (1981) (*per curiam*) (reversing California Court of Appeals' holding that *Miranda* warnings were inadequate); *see also United States v. Cruz*, 910 F.2d 1072, 1078 & nn.2, 3 (3d Cir. 1990) (adequacy of *Miranda* warnings treated by the Supreme Court as a legal issue), *cert. denied*, 498 U.S. 1039 (1991); (2) determining what circumstances constitute an invocation of the right to counsel and the right to remain silent, *see, e.g., McNeil v. Wisconsin*, 501 U.S. 171, 175-180 (1991) (affirming Wisconsin Supreme Court's ruling that accused's request for counsel at initial appearance on charged offense does not constitute invocation of counsel for *Miranda* purposes on other charges); *Connecticut v. Barrett*, 479 U.S. 523, 526-530 & n.1 (1987) (reversing Connecticut Supreme Court's ruling that a request for counsel prior to making a written statement constitutes an invocation of respondent's right to counsel for all purposes); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-1046 (1983) (reversing Oregon Court of Appeals' holding that inquiry respondent made to police officer did not "initiate" conversation); *Fare v. Michael C.*, 442 U.S. 707, 716-724 (1979) (reversing California Supreme Court's holding that a juvenile suspect's request for his probation officer was a *per se* invocation of Fifth Amendment rights); and (3) determining the circumstances in which the "public safety" exception to *Miranda* may be invoked, *see, e.g., New York v. Quarles*, 467 U.S. 649, 655-658 (1984); *id.* at 677 (Marshall, J., dissenting).

B. The Uniquely Legal Nature Of *Miranda* "Custody" Determinations And Practical Imperatives Of Sound Judicial Administration Require That, Consistent With The Functional Principles Articulated By The Court In *Miller v. Fenton*, Such "Custody" Determinations Be Reviewed *De Novo*

The Court's decision in *Miller v. Fenton*, 474 U.S. at 113-114, suggests a framework for decision where the application of the traditional *Townsend* definitions is difficult and the distinction between a question of fact and a mixed question of law and fact in a particular case proves elusive. Although this is not such a case, in that the traditional *Townsend* analysis compels the conclusion that *Miranda* "custody" is a mixed question, *Miller* underscores the wisdom of that conclusion.

The *Miller* Court determined that the Fourteenth Amendment due process inquiry into the voluntariness of a confession is an essentially legal inquiry, to be reviewed *de novo*. In analyzing this question, the Court acknowledged that "[p]erhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." *Id.* at 113-114 (citing Monaghan, *Constitutional Fact Review*,

85 Colum. L. Rev. 229, 237 (1985)). The *Miller* Court declined to base this "allocation" decision upon the fortuity of whether the issue is raised on habeas review or on direct appeal. *See Miller*, 474 U.S. at 110-111. Rather, it suggested that issues which are difficult to classify using traditional definitions may be "allocated" to law or to fact on the basis of the relative institutional expertise of trial and reviewing courts, be they state or federal:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, *as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.*

Id. at 114 (emphasis added); *see also Pierce*, 487 U.S. at 559-560; *Rushen*, 464 U.S. at 120; *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (applying functional analysis in holding that the question whether exigent circumstances exist is a mixed question subject to plenary review), *cert. denied*, 469 U.S. 824 (1984).

1. *The* Miranda *"Custody" Question, Like The Due Process Voluntariness Inquiry, Requires Courts To Exercise Judgment About The Values That Animate The Legal Principle And Thus Is A Primarily Legal Question Best Reviewed* De Novo.

Where the "nature of the inquiry," *Miller*, 474 U.S. at 115, requires courts to consider "legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," functional considerations dictate that the inquiry be subject to plenary review. *McConney*, 728 F.2d at 1202. Thus, the *Miller* Court examined the nature of the due process voluntariness inquiry and determined that because of its "hybrid quality," "subsuming, as it does, a 'complex of values,'"

the inquiry has "a uniquely legal dimension" and cannot appropriately be treated as a question of fact. *Miller*, 474 U.S. at 116 (citation omitted). In such circumstances, the trier of fact is not in an "appreciably better position" to determine the predominantly legal issue, *id.* at 117; rather, reviewing courts must exercise their traditional "obligation to say what the law is." *West*, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment); *see also* Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. at 275; *McConney*, 728 F.2d at 1201 (plenary review in such circumstances is appropriate because appellate decision-makers are better positioned to make, and more experienced in making, these determinations). The Court's application of the *Miranda* "custody" standard ultimately has rested on value judgments about the applicability of the Fifth Amendment concerns animating the *Miranda* decision to the situation at issue. It is the traditional function of reviewing courts, and particularly this Court, to exercise the control that plenary review of this essentially legal inquiry permits, so that suspects' free exercise of their Fifth Amendment rights, as well as law enforcement's legitimate investigatory interests, are neither underprotected nor overprotected.

In its "custody" precedents over the years, the Court has chosen to address certain recurring factual situations as to which the lower courts required guidance or correction, *see, e.g., Berkemer*, 468 U.S. at 435-436 n.23; *Beckwith*, 425 U.S. at 342, and has separated on a case-by-case basis those factors deemed probative from those deemed irrelevant. *See, e.g., Stansbury*, 114 S.Ct. at 1529-1530; *Beheler*, 463 U.S. at 1125. In so doing, the Court has rejected arguments that one circumstance—apart from actual arrest—should be conclusive for purposes of determining that a defendant is or is not in custody. *See, e.g., Stansbury*, 114 S.Ct. at 1530 (officer's articulated belief that defendant is the prime suspect, while relevant, is not dispositive); *Berkemer*, 468 U.S. at 436-437, 440-441 (fact that traffic stop is a Fourth

Amendment "seizure" does not mean that the motorist is therefore in *Miranda* "custody" but circumstances of a traffic stop may rise to level of "custody"); *Orozco*, 394 U.S. at 326-327 (*Miranda* not inapplicable simply because defendant was interrogated at home as opposed to at stationhouse). Thus, the Court has not limited *Miranda*'s applicability to formal felony arrests, *see Berkemer*, 468 U.S. at 434-435, 440, but has also refused to extend *Miranda*'s requirements to all " 'coercive environment[s].' " *Mathiason*, 429 U.S. at 495; *see also Beheler*, 463 U.S. at 1124. Even the fact that a defendant is actually in custody, in the sense of being physically incarcerated, may not automatically translate into "custody" for *Miranda* purposes. *Perkins*, 496 U.S. at 299 ("[t]he bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official"); see *also United States v. Menzer*, 29 F.3d 1223, 1230-1233 (7th Cir.) (applying *de novo* review and holding that incarceration does not, *per se*, render an interrogation custodial), *cert. denied*, —— U.S. ——, 115 S.Ct. 515 (1994).

Forsaking the application of fact-bound formulas, the Court has instead assessed the significance of the restraint a reasonable person would have perceived in the circumstances in light of the values underlying the *Miranda* decision. The analytical focus is whether the interrogation situation is sufficiently coercive that *Miranda*'s protections are necessary to shield the accused's free exercise of his or her constitutional right to be free from compelled self-incrimination. *See, e.g., Perkins*, 496 U.S. at 296 (circumstances did not constitute "custodial interrogation" because "conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*"); *Berkemer*, 468 U.S. at 437; *Murphy*, 465 U.S. 430-433 (probation interview not an inherently coercive setting so as to require *Miranda* warnings); *see also Bruder*, 488 U.S. at 10-11; *Beckwith*, 425 U.S. at 345, 347; *Mathis*, 391 U.S. at 4.

For example, in *Berkemer*, the Court declined to "accord talismanic power" to the *Miranda* definition of "custodial interrogation," explaining that:

> Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, *but only in those types of situations in which the concerns that powered the decision are implicated.* Thus, we must decide whether a traffic stop *exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.*

468 U.S. at 437 (emphasis added). The *Berkemer* Court considered the typical circumstances of a traffic stop in light of the concerns driving the *Miranda* Court and concluded that a traffic stop generally presented a "comparatively nonthreatening" environment not necessitating the provision of *Miranda* warnings. *Id.* at 440; *see also id.* at 435-439; *Bruder*, 488 U.S. at 10-11. While the Court stated that the "noncoercive aspects of ordinary traffic stops" generally mean that persons temporarily detained pursuant to such stops are not in "custody" for *Miranda* purposes, the Court made clear that if a motorist, during a traffic stop, "is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer*, 468 U.S. at 440; *see also Bruder*, 488 U.S. at 10-11, nn.1, 2.

The *Berkemer* Court recognized that its refusal to adopt a rule providing simply that *Miranda* does not apply to traffic stops meant that "police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody." *Berkemer*, 468 U.S. at 441. However, the Court found this flexible approach necessary to ensure that the proper balance is achieved in each case between society's fundamental interest in protecting citizens' Fifth Amendment rights and its interest in promoting the enforcement of the Nation's traffic laws. *Id.* at 441 & n.33.

As *Berkemer* illustrates, the Court has used the custodial interrogation requirement to distinguish between those situations in which the coercive aspects of an interrogation threaten the free exercise of Fifth Amendment rights and those situations in which the threat is sufficiently attenuated that it cannot overcome the public's legitimate interest in the questioning of crime suspects. *See also Perkins*, 496 U.S. at 296-297, 300. This quintessentially legal analysis enables the Court to control the balance struck between fundamental Fifth Amendment values and legitimate law enforcement interests in recurring factual situations.

Consistent with this underlying purpose of the threshold "custody" requirement, the Court has exercised its plenary authority to ensure that *Miranda*'s protection of Fifth Amendment values is not inappropriately diluted. *See Berkemer*, 468 U.S. at 429-442; *Estelle*, 451 U.S. at 466-469 (affirming Fifth Circuit's ruling, on habeas review, that admission in capital sentencing proceeding of respondent's unwarned statements made during a court-ordered psychiatric examination violated his Fifth Amendment privilege against self-incrimination); *Orozco*, 394 U.S. at 324-327 (reversing Texas Court of Criminal Appeals' ruling that *Miranda* warnings were not required because petitioner was interrogated in his own bed, in familiar surroundings); *Mathis*, 391 U.S. at 4-5 (reversing federal courts' determination that *Miranda* protections are only applicable to questioning of a suspect in custody in connection with the very case under investigation).

The Court, however, has also declined to apply *Miranda*'s requirements in situations that do "not present the elements which the *Miranda* Court found so inherently coercive as to require its holding." *Beckwith*, 425 U.S. at 347. Indeed, in most of the cases in which the Court has addressed the threshold custodial interrogation issue, it has exercised its *de novo* review to ensure that the interests of law enforcement are not unduly impaired

where the totality of the objective circumstances do not reveal a need to shelter a suspect's constitutional right to be free from compelled self-incrimination. *See, e.g., Perkins*, 496 U.S. at 294-300 (reversing Appellate Court of Illinois' determination that the incarcerated defendant was subjected to custodial interrogation by undercover agent within the meaning of *Miranda*); *Bruder*, 488 U.S. at 10-11 (*per curiam*) (reversing Pennsylvania Superior Court's ruling that defendant was subjected to custodial interrogation during traffic stop); *Murphy*, 465 U.S. at 426-434 (reversing Minnesota Supreme Court's holding that statements made by a probationer to his probation officer were obtained in violation of his Fifth Amendment rights, and ruling that probationer was not subjected to custodial interrogation); *Beheler*, 463 U.S. at 1121-1125 (*per curiam*) (reversing California Court of Appeal's holding that respondent was in "custody"); *Mathiason*, 429 U.S. at 494-496 (*per curiam*) (reversing Oregon Supreme Court's holding that respondent was in "custody"); *Beckwith*, 425 U.S. at 344-348 (affirming lower federal courts' holdings that the fact that defendant was the focus of the investigation did not render *Miranda* applicable); *see also Stansbury*, 114 S.Ct. at 1530 (*per curiam*) (reversing California Supreme Court's application of "custody" standard to facts, ruling that the state court improperly considered officer's subjective and unarticulated beliefs and erroneously concluded that petitioner's *Miranda* rights were triggered because petitioner was the focus of the officers' suspicions); *cf. also supra*, footnote 13.

2. *The Need For Consistency And Uniformity In The Application Of The "Custodial Interrogation" Threshold Test, And The Precedential Importance Of Such Determinations In Guiding Official Conduct, Require That The "Custody" Issue Be Subject To Independent Review.*

Precisely because the "task of defining 'custody' is a slippery one," *Elstad*, 470 U.S. at 309, in that the "custody" inquiry is a predominantly legal exercise requir-

ing application of the objective standard in light of the values underlying the *Miranda* decision, *de novo* review of "custody" determinations is mandated by imperatives of sound judicial administration. Plenary review permits reviewing courts not only to police the application of the *Miranda* "custody" requirement in light of Fifth Amendment concerns present in specific contexts, *see supra*, pages 24-29, it also promotes some measure of consistency in the case-by-case development of the "custody" standard, and thus provides specific guidance to all actors in the criminal justice system who must rely upon judicial precedents to guide their conduct.

The Court has recognized that where "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication," the standard should be treated as one of law, subject to plenary review. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984) (*de novo* standard, not Fed. R. Civ. P. 52(a) clearly erroneous standard, applicable to review of determination of actual malice in cases governed by *New York Times v. Sullivan*, 376 U.S. 254 (1964)); *see also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (same); *Miller*, 474 U.S. at 114; Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. at 229, 273-276. In such circumstances, the purely "legal" function of saying "what the law is" can only be accomplished by applying the relevant standard to a series of closely related situations that require the elaboration of the basic legal norm. *See id.* at 273-276; *Miller*, 474 U.S. at 114. The exercise of this plenary review power "is the process through which the rule itself evolves and its integrity is maintained." *Bose Corp.*, 466 U.S. at 503 (footnote omitted).

As explained *supra*, pages 24-29, the *Miranda* "custody" standard, like the Fourth Amendment reasonableness standard, is not "susceptible of Procrustean application." *Ker v. California*, 374 U.S. 23, 33 (1963). The

"custody" cases are akin in this fundamental respect to the effectiveness of counsel cases and the voluntariness cases, in which plenary review is appropriately applied: by adopting a standard to be applied to the "totality of the circumstances," the Court invites the case-by-case development of a body of precedents that, when considered together, provide guidance as to future applications of the legal standard. *See, e.g., Miller*, 474 U.S. at 114; *cf. Alston v. Redman*, 34 F.3d 1237, 1245 (3d Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1122 (1995); *Mesa*, 638 F.2d at 584. To provide guidance as to the developing "custody" standard, this Court has applied it in recurring factual situations, culling the relevant factors from the irrelevant, and deciding whether the resulting mix of circumstances, as weighted and approved by the Court in light of the Fifth Amendment values underlying *Miranda*, yields a result contrary to that determined below. *See, e.g., Stansbury*, 114 S.Ct. at 1529-1530 (discussing relevancy and weight of certain factors in resolving "custody" question in the context of stationhouse questioning); *Beheler*, 463 U.S. at 1125 (certain factors irrelevant to determination of "custody" in stationhouse questioning context); *Mathiason*, 429 U.S. at 495-496 (same). Where, as here, the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller*, 474 U.S. at 114.

This principle is particularly important in the *Miranda* context. *Miranda* "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation," and "[t]his gain in specificity . . . benefits the accused and the State alike." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). Incoherence in the "custody" precedents upon which law enforcement must rely would ultimately endanger the core

value of *Miranda*—the clear rules it provides police and courts on the conduct of a custodial interrogation—because police officers and courts would no longer be certain as to when those rules are applicable. *Cf. Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, Circuit Justice, granting application for stay) (noting that the precision of *Miranda* "would be eviscerated if the prophylactic rules were freely augmented by other courts"); *cf. also Oregon v. Hass*, 420 U.S. 714, 719 (1975). *Miranda* "custody" determinations therefore have a unique claim on the "normal law-clarifying benefits that come from an appellate decision on a question of law." *Pierce*, 487 U.S. at 561.

Given the frequency with which this Court has found it necessary to correct state and federal courts' application of the "custody" standard, the potential for disuniformity in the application of this threshold inquiry is demonstrably great. *See supra*, cases cited at pages 28-29, *Berkemer*, 468 U.S. at 435-436 n.23.[14] Were the "custody" determination to be treated as a question of fact, subject to correction only if not fairly supported in the record or clearly erroneous, state and federal reviewing courts would be required to affirm irreconcilable "custody" decisions made on analogous facts. As long as the trial judge's opinion rests on some defensible application of the standard, reviewing courts and this Court would have to defer, even though the trial judge's application of the legal standard were deemed wrong, or perhaps worse, inconsistent with other trial judges' rul-

[14] *See also Bradley v. Ohio*, 497 U.S. 1011, 1012 (1990) (Marshall, J., dissenting from denial of a writ of *certiorari*); *Maine v. Thibodeau*, 475 U.S. 1144, 1145 (1986) (Burger, C.J., dissenting from denial of a writ of *certiorari*) (objecting to Maine Supreme Court's reliance, in resolving the custody question, on factors that had been rejected by either the Court or other state and federal courts, and concluding that the Maine Supreme Court's decision "*illustrates an acute need for clarification of the proper factors to be considered in making the 'in custody' determination*") (emphasis added).

ings. The outcome of *Miranda* claims would not only be difficult to predict, but would vary from State to State, Circuit to Circuit, and within jurisdictions. The result would be jurisdictional disparities not only in the degree of Fifth Amendment protection accorded suspects in a given situation, but also in the standards of conduct the law enforcement community must follow. "Neither the police nor criminal defendants would benefit from such a development." *Berkemer*, 468 U.S. at 432.

3. *The Objective "Custody" Test Does Not Rely For Its Effective Application On Credibility Determinations Or Determinations Of Subjective Intent And Thus Its Resolution Does Not Require The Particular Expertise Of Trial Courts.*

The Court has found that there are certain mixed questions of law and fact which, being "rooted in factual determinations," *Cooter & Gell v. Hartmax*, 496 U.S. 384, 401 (1990), are "essentially factual," *Pullman-Standard*, 456 U.S. at 288, and should be reviewed deferentially. *See Witt*, 469 U.S. at 429; *McConney*, 728 F.2d at 1203 (discussing "exception" made for certain essentially factual questions). Under the Court's functional analysis, the determinative test of whether a question should be deemed essentially factual is whether the trier of fact, by virtue of its superior ability to judge witnesses' demeanor and credibility, is in an "appreciably better position" to resolve the issue in question than the reviewing court. *Miller*, 474 U.S. at 117; *see also id.* at 114, 116-117; *Cooter & Gell*, 496 U.S. at 401-403; *Rushen*, 464 U.S. at 120-122 & n.6.[15]

[15] An additional consideration is the extent to which the determination involves " 'multifarious, fleeting, special, narrow facts that utterly resist generalization,' " *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 404 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 561-562 (1988)), such that the precedential value of the decision is limited. As discussed *supra*, pages 29-33, this consideration does not apply in the "custody" context: courts can, and must, provide guidance as to the relevance and weight of

Where the issue turns on the determination of subjective state of mind, and thus largely on witness credibility, the Court has generally treated it as one of historical fact because the trial judge is deemed best situated to resolve credibility issues. For example, when considering the question of juror bias, the "fundamental role" that the juror's demeanor plays in the determination of the juror credibility issue requires that deference be paid to the trier of fact. *Patton*, 467 U.S. at 1038 & n.14; *see also Mu'min v. Virginia*, 500 U.S. 415, 424 (1991); *id.* at 433 (O'Connor, J., concurring); *Witt*, 469 U.S. at 429; *Rushen*, 464 U.S. at 120-122 & n.6. Because the question of a defendant's competency turns largely on a first-hand assessment of the quality of the defendant's mental functioning and the credibility of expert testimony, the competency issue also has been deemed a question of fact for purposes of section 2254(d). *See, e.g., Maggio v. Fulford*, 462 U.S. 111, 113, 117-118 (1983); *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (*per curiam*); *but see Drope v. Missouri*, 420 U.S. 162, 174-175 & n.10 (1975). Similarly, "[t]reating issues of intent as factual matters for the trier of fact is commonplace." *Pullman-Standard*, 456 U.S. at 288; *see also United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 716-717 (1983); *Oregon v. Kennedy*, 456 U.S. 667, 675, 679 (1982). This is so because the finding of intent " 'largely will turn on evaluation of credibility.' " *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion) (quoting *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986); *see also Hernandez*, 500 U.S. at 364-365; *Pullman-Standard*, 456 U.S. at 284-289.

These principles have no applicability in this context because this Court has expressly declined to found "custody" determinations on any actor's state of mind. *See supra*, pages 15-17. In resolving *Miranda* "custody"

particular circumstances in recurring interrogation situations so that the law enforcement community has some rules upon which it can safely rely.

questions, even more so than in judging due process voluntariness claims, "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue." *Miller*, 474 U.S. at 116-117. To the extent that credibility issues arise regarding the circumstances of the interrogation, the state courts' resolution of those issues, like its determination of the other historical facts, will be presumed correct, if fairly supported, under section 2254(d). *Cf. Rushen*, 464 U.S. at 120-122 & n.6; *Maggio*, 462 U.S. at 113; *Marshall*, 459 U.S. at 432-435. However, once the moment comes for determining whether, given the totality of the relevant facts found, the concerns underlying *Miranda* require the invocation of *Miranda*'s protections, the court is required to make legal value judgments, not assessments of demeanor or veracity. Accordingly, the trial court is not in "an appreciably better position than the federal habeas court to make that determination." *Miller*, 474 U.S. at 117.[16]

C. Considerations Of Federalism And Finality Do Not Require That The Application Of The *Miranda* "Custody" Standard To The Circumstances Be Treated As A Question Of Fact

By promoting uniformity and consistency in the application of the *Miranda* standard in and among federal and state courts, *de novo* review fosters, rather than inhibits, federal-state relations. A State has "a weighty interest in having valid federal constitutional criteria

[16] Other considerations relevant to the sound administration of justice which counsel deference to the *factual* determinations of trial courts are equally irrelevant here. There is no threat posed to accuracy in factfinding because belated reconstruction of historical facts is not required; only the legal significance of the uncontested facts is at issue. For much the same reason, plenary review does not unduly tax judicial resources. Indeed, *de novo* determination of the "custody" issue would appear to involve no greater expenditure of time than is necessarily involved in evaluating whether a state-court determination finds "fair support" in the record.

applied in the administration of its criminal law by its own courts." *Rogers v. Richmond*, 365 U.S. 534, 548 (1961). To the extent that " '[a] healthy federalism depends upon the avoidance of needless conflict between state and federal courts,' " *Ker*, 374 U.S. at 31 (quoting *Elkins v. United States*, 364 U.S. 206, 221 (1960)), " '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted . . . by recognition of their . . . mutual obligation to respect *the same fundamental criteria* in their approaches.' " *Ker*, 374 U.S. at 31 (emphasis in original) (quoting *Mapp. v. Ohio*, 367 U.S. 643, 658 (1961)). Only plenary review will ensure that there is some consistency and uniformity in the identification and application of the criteria to be considered in determinations of "custody." *See supra*, pages 29-33.

Any possible tension created by plenary federal review must be regarded as negligible in light of this Court's decision in *Withrow v. Williams*, 113 S.Ct. 1745. In *Withrow*, the Court concluded:

> One might argue that tension results between the two judicial systems whenever a federal habeas court overturns a state conviction on finding that the state court let in a voluntary confession obtained by the police without the *Miranda* safeguards . . . . It is not reasonable, however, to expect such occurrences to be frequent enough to amount to a substantial cost of reviewing *Miranda* claims on habeas or to raise federal-state tensions to an appreciable degree.

Id. at 1754-1755. Because "eliminating review of *Miranda* claims would not . . . advance the cause of federalism in any substantial way," (*id.* at 1754), eliminating *de novo* review of a small subset of that universe of claims—those challenging *Miranda* "custody" determinations—would have even less consequence for federal-state relations. *See also O'Neal v. McAninch*, —— U.S. ——, 115 S.Ct. 992, 998 (1995) (state's interest diminished

by legal circumstance that state "bears responsibility for the error that infected the initial trial").

Nor is such review likely to imperil legitimate finality interests. If a petitioner is effectively foreclosed by a ruling that he was not in "custody" from pursuing a *Miranda* claim, he will recast his claim as a due process challenge to the voluntariness of his confession. *Withrow*, 113 S.Ct. at 1754. Given that the Court "could lock the front door against *Miranda*, but not the back," little would be gained from deciding that habeas-related considerations of federalism and finality require that the "custody" issue be treated as one of fact. *Id.* at 1754.

II. SHOULD THE COURT DECIDE TO ADDRESS THE ISSUE, RATHER THAN REMANDING FOR PLENARY CONSIDERATION IN THE FIRST INSTANCE BY THE NINTH CIRCUIT, PETITIONER WAS IN "CUSTODY" FOR *MIRANDA* PURPOSES ON THE OBJECTIVE FACTS OF THIS CASE

The Ninth Circuit, relying on the presumption of correctness accorded state-court factual findings, did not independently review the mixed question whether this petitioner was in "custody or otherwise deprived of his freedom of action in any significant way" such that the admission of his unwarned statement violated his rights under *Miranda*. (JA 40-42) The issue whether petitioner was actually in "custody" for *Miranda* purposes on the undisputed facts of the case was not raised in the petition for *certiorari* or in the State of Alaska's opposition to the petition. Accordingly, the appropriate disposition would be to reverse and remand the issue for consideration in the first instance by the Ninth Circuit. *See* Sup. Ct. R. 24(a); *see also Stansbury*, 114 S.Ct. at 1531 (remanding for further proceedings); *Miller*, 474 U.S. at 118 (same).

Should the Court determine that it wishes to reach this issue to provide additional guidance to the lower courts in the application of the "custody" standard, *see, e.g.*,

Berkemer, 468 U.S. at 435-436 n.23, petitioner submits that, given the coercive custodial environment demonstrated on this record, a reasonable person would have concluded that his freedom was significantly restrained.

Petitioner was asked to come down to the police station. Although expecting merely to identify his ex-wife's effects, a procedure which was complete within minutes (Tr. 1-4), he was instead taken to a small interrogation room where two state troopers brought to bear on petitioner *all* of the "psychologically . . . oriented" police practices that were relied upon by the *Miranda* Court in substantiating the "inherently coercive" nature of the stationhouse interrogations at issue in that case. *Miranda*, 384 U.S. at 448, 467; *see also Beckwith*, 425 U.S. at 346 n. 7.

First, the police officers isolated petitioner in the unfamiliar, police-dominated environment of the stationhouse —a factor deemed significant in *Miranda* and subsequent cases. *See, e.g., Murphy*, 465 U.S. at 433; *Berkemer*, 460 U.S. at 438; *Beckwith*, 425 U.S. at 346 n.7; *Miranda*, 384 U.S. at 448-450, 457. Then, "[t]o highlight the isolation and unfamiliar surroundings," the troopers "display[ed] an air of confidence in the suspect's guilt and from outward appearance . . . maintain[ed] only an interest in confirming certain details." *Id.* at 450. The troopers confronted petitioner with mounting evidence of his guilt,[17] told him that his house was in the process of being searched, and informed him that a search warrant for the truck he drove to the police station was "gonna

[17] For example, they told him that his friends were "pointing at [him]" (JA 45), that the murder weapon had been recovered (JA 54), that the tire tracks at the location where the body had been recovered matched the tracks of his truck (JA 45, 61), that the physical evidence was at that moment being examined by the "wizards" in the state technical laboratory (JA 64), and that the police possessed a "tremendous number" of additional facts evidencing petitioner's guilt that they would not yet disclose. (JA 47, 50, 54, 59, 61-62)

be served." (JA 50). They repeatedly assured petitioner that they believed absolutely in his guilt, *see, e.g.* (JA 53) ("you killed Dixie . . . . There's no question about that"), and that they could "prove conclusively beyond a reasonable doubt" (JA 49) that petitioner had committed the crime.[18] The troopers' articulated views regarding petitioner's culpability, although not dispositive, are obviously material to the "custody" determination. *See Stansbury*, 114 S.Ct. at 1530.

"[T]o put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty," the troopers "minimize[d] the moral seriousness of the offense" and "cast blame on the victim." *Miranda*, 384 U.S. at 450 (footnote omitted). They emphasized that they did not believe that petitioner was a "cold-blooded killer," (JA 53-54, 59), or that he had planned to kill his ex-wife (JA 51, 53-54, 59-60, 73). They suggested instead, time and time again, that "what happened was entirely her fault" (JA 72) and that the crime was one that "this foolish bitch brought on herself really." (JA 46)[19]

[18] *See also* (JA 47) ("I think you did do this thing"); (JA 49) ("See I know that you did this thing. There's—there's no question in my mind about that."); (JA 52-53) ("I mean obviously you know that you're in trouble right now. There's no question about that, right? . . . . you did—you killed Dixie. I mean that's—that's what you're in trouble over and you know that. There's no question about that."); (JA 54) ("I know that you did this thing"); (JA 58) ("[Y]ou're the guy who killed her. There's no question about that."); (JA 65) ("Well you did it. There's no question that you killed Dixie. Let's get passed [sic] that.").

[19] *See also* (JA 46) ("she's got you in real trouble this time); (JA 47-48) ("I think that she . . . brought the situation on, that she got you into what got to be the biggest trouble she's ever gotten you in before"); (JA 51) ("she's finally got you into more trouble than she can possibly imagine"); (JA 55) ("I have to feel that whatever happened to Dixie, if she's partially responsible for it, you shouldn't take all of the blame for it"); (JA 57) ("she's got you in a hell of a bind. I mean she brought this thing on, she left you there, stuck with this body . . . . She brought this

Petitioner was then "offered legal excuses for his actions in order to obtain an initial admission of guilt." *Miranda*, 384 U.S. at 451. The troopers made excuses for petitioner's conduct, suggested that petitioner acted in self-defense, and posited that the crime was one of passion.[20] They also emphasized that this was petitioner's last chance to avoid a life sentence in favor of a much lighter sentence for negligent homicide or manslaughter. *See, e.g.* (JA 54-56, 68-69).[21]

---

thing on. It's her fault. Why should you be forced to live with that"); (JA 63) ("Because of that whatever happened out there happened not because you wanted it to, not because you set out to have it happen, but because she brought it on"); (JA 65) ("That's her final revenge, that's the final time that she screws you. She left you stuck with this fallacious mess that she brought on."); (JA 71) ("if you can be honest about this thing, and finally explain that's what happened, to make us understand the why, in what way Dixie was responsible, in what way she caused this thing to happen"); (JA 72) ("it's her fault. When you get right down to it,I—I think that probably you'll be able to convince me that what happened was entirely her fault"); (JA 73) ("she brought this thing on. And its her fault").

[20] *See, e.g.*, (JA 51) ("I mean I don't know whether she started the thing by grabbing the knife"); (JA 56) (manslaughter would be available if what happened was that "she starts it and she's coming at you and you defend yourself"); (JA 58) (if "it happened so fast that you weren't able to think through the whole result . . . . if that's what happened, then . . . that's not first degree murder . . . . I mean are we talking about heat of passion here and are we talking self-defense, these are the questions which are so important for us to get to now"); (JA 66) (describing scenario and concluding "if that's what happened, if that's the way it went down, then we need to know that, because that's not first degree murder. That's not premeditated"); *see also* (JA 60, 64, 67, 73).

[21] *See, e.g.*, (JA 49) ("[T]his is probably the last chance we'll have to—for you to say something that other people are gonna believe"); (JA 62) ("[W]e've got like a limited reasonable opportunity here, the things—the thing is going down now. This —this is it"); (JA 69) ("[R]ight now is the time when we've got to make the decision of which way we're heading on this thing"); (JA 75) ("I'm giving you an opportunity which I don't see how it'll ever come again"); *see also* (JA 52, 53, 60, 64, 71).

Finally, Trooper Stockard " 'rel[ied] on an oppressive atmosphere of dogged persistence,' " " 'dominat[ing] his subject and overwhelm[ing] him with his inexorable will to obtain the truth.' " *Miranda*, 384 U.S. at 451 (citation omitted). Indeed, at one point, the troopers engaged in a prolonged and psychologically devastating harangue that consumed more than twenty pages of the transcript, during which petitioner uttered no more than ten sentences. (Tr. 60-80) Such "prolonged accusatory questioning is likely to create a coercive environment from which an individual would not feel free to leave." *United States v. Griffin*, 7 F.3d 1512, 1518 (10th Cir. 1993). "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Miranda*, 484 U.S. at 461.

The "concerns that powered the [*Miranda*] decision" are clearly implicated here: petitioner was subjected to a textbook example of the very pressures that the *Miranda* Court feared would "sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *Berkemer*, 468 U.S. at 437. The police attempted to manipulate the circumstances to make the interrogation appear noncustodial (JA 8-9; *see also* JA 16), by telling petitioner that he was not under arrest and would be free to leave no matter what he said (JA 74, 76),[22] while apparently intending to arrest petitioner shortly after the conclusion of the interview. *See* (JA 8-9). The trial court, in weighing the circumstances of this "close" case (JA 9), appeared to conclude that the troopers' statements that petitioner was free to go, although a "devious police tactic" (JA 8), tipped the scales toward a finding that a reasonable person would not have believed himself in "custody" for *Miranda* purposes. (JA 8). What the trial court failed adequately to consider, however, is the fact that, like the court itself, a reasonable person under the circumstances

---

[22] *See also* (JA 44-45, 49, 50, 52-53, 61, 76-77, 78-79).

would not have found these statements credible. *See Sumner II*, 455 U.S. at 597 (on habeas review of a mixed question, "the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard").

A reasonable person would have recognized, when the interview commenced, that he had been summoned to the station on a "pretext." (JA 26) The troopers then began what appeared to be a strictly informational interview in which they asked petitioner about his last encounters with the victim. (Tr. 4-37) While drawing him out in this initial questioning, they gave no evidence that they suspected him of the crime. *Id.* After he spoke freely with them, they then completely changed the nature of the interview, suddenly confronting him with their certainty of his guilt and the strength of their evidence. (Tr. 38-87) Given the troopers' patent dissembling, a reasonable person at this point would have been extremely wary of their assurances, as petitioner evidently was.[23] In short, a reasonable person in petitioner's position would not, despite the troopers' protestations to the contrary, have believed that he was free to leave. *See, e.g., United States v. Lee*, 699 F.2d 466, 467-468 (9th Cir. 1982) (despite police assurances that suspect was free to go, a "reasonable person" would not have felt he was at liberty to leave).[24]

---

[23] *See, e.g.*, (JA 74) ("No matter what you ain't gonna arrest me? . . . . What I tell you, you ain't gonna arrest me . . . . Why wouldn't you?"); (JA 76) ("So then you're gonna let me walk out of here?"); (JA 77) ("As long as you let me go take care of my stuff is all I'm asking"); *see also* (JA 50, 53).

[24] As the interrogation wore on, the officer's assurances became less absolute; it became clear that if the officers let petitioner go, it would be only temporary. *See* (JA 61) (troopers told petitioner that he would walk out of the interview but "I can't tell you that this thing is all over when you walk out, you know it's not"); (JA 52-53, 77-78); (Tr. 101). At the conclusion of the interview, the troopers cautioned "don't leave town. You know, don't run." (Tr. 101). They then drove petitioner to a friend's home. (JA 78) The fact that petitioner was eventually allowed to leave the station is certainly not dispositive of what a reasonable person would have believed his situation to be during the course of the interview itself. *See, e.g., State v. Cassell*, 602 P.2d 410, 414-415 & n.11 (Alaska 1979). Moreover, although petitioner was driven to his friend's house, a reasonable person would have been aware that he never truly regained his "freedom of movement." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Petitioner's truck—his sole form of transportation—had been seized (JA 78), and the record indicates that the trooper remained in his car outside petitioner's friend's residence while the troopers secured a warrant for petitioner's arrest. *See* (St. 2478). The dictates of *Miranda* cannot be circumvented simply by, as here, allowing a suspect to leave, under police escort and with continuing surveillance, and postponing a formal arrest for a few hours. *Cf. Bruder*, 488 U.S. at 10 n.1 ("We did not announce an absolute rule for all motorist detentions, observing that lower courts must be vigilant that police do not 'delay formally arresting detained motorists' ") (quoting *Berkemer*, 468 U.S. at 440); *Berkemer*, 468 U.S. at 441 (declining to adopt a bright-line rule which "would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*").

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to conduct an independent review of the question whether petitioner was in "custody" for *Miranda* purposes or, should the Court resolve that issue, to conduct the appropriate harmless error analysis.

Respectfully submitted,

JULIE R. O'SULLIVAN
(Appointed by This Court)
Associate Professor of Law
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20009
(202) 662-9394
Counsel of Record for Petitioner

APPENDIX

APPENDIX A

28 U.S.C. § 2254

§ 2254. State custody; remedies in State courts

* * * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.